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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte EMRE BARIS AKSU, IGOR DANILO CURCIO, DAVID LEON, VIKTOR VARSA, and RU-SHANG WANG

Appeal 2009-003123
Application 10/779,318
Technology Center 2400

Decided: December 9, 2009

Before HOWARD B. BLANKENSHIP, JAY P. LUCAS, and STEPHEN C. SIU, *Administrative Patent Judges*.

SIU, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

This is a decision on appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1-13. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

Invention

The invention relates to signaling of multimedia streaming quality adaptation and control mechanisms (Spec. 1).

Independent claim 1 is illustrative:

> 1. A method for signaling and negotiation between a client and a server in a multimedia streaming service, wherein a plurality of adaptation mechanisms or capabilities for use in the service for data delivery are supported by the client, each adaptation mechanism or capability having an attribute, said method comprising:
>
> the client providing information indicative of the attributes defining the adaptation mechanisms or capabilities regarding data delivery process that are supported by the client;
>
> the server selecting one or more of the attributes based on the provided information; and
>
> the server providing to the client further information indicative of the selected attributes so as to allow the client to know the one or more adaptation mechanisms or capabilities defined by the one or more attributes selected by the server.

References

The Examiner relies upon the following references as evidence in support of the rejection:

Riddle US 6,175,856 B1 Jan. 16, 2001
Appellants' Admitted Prior Art, Spec. 1-2 ("AAPA").

Rejection

Claims 1-13 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Riddle and AAPA.

ISSUE 1

Appellants argue that when they have "merely identified a problem, and propose[d] a solution to the problem, it is impermissible hindsight reasoning to use [their] own disclosure to provide the motivation to combine the references to arrive at the claimed limitation" (App. Br. 8).

Issue: Did Appellants demonstrate that the Examiner erred in finding that it would have been obvious to one of ordinary skill in the art to combine Riddle and the AAPA?

ISSUE 2

Appellants argue that the "*AAPA* mentions nothing about signaling and negotiation of mechanisms used to adapt the data delivery process." (App. Br. 9).

Issue: Did Appellants demonstrate that the Examiner erred in finding that the combination of the Riddle reference and AAPA teaches the claimed signaling and negotiation of mechanisms used to adapt the data delivery process?

FINDINGS OF FACT

The following Findings of Fact (FF) are shown by a preponderance of the evidence.

1. Riddle teaches "[a] digital processing system and method which controls selection of a compressor in a communication system." (Abstract).

2. Riddle's "compressor negotiation process . . . is performed for video data . . . audio data . . . . [and] may also be

repeated if other data (e.g., a text file) . . . is transferred . . . ." (Col. 2, ll. 31-37).

3. Riddle teaches that compression/decompression "selection, however optimum, must occasionally be reevaluated." (Col. 10, ll. 56-57).

4. AAPA discloses, under "Background of the Invention,"

> [i]n a multimedia streaming service . . . the client and server communicate with each other over the network regarding the methods of capability exchange, content delivery method negotiation, content delivery control, and so forth. Such information exchange can be carried out via well-defined network protocols.

(Spec. 1, ll. 19-25).

5. AAPA discloses, under "Background of the Invention,"

> in order for a [multimedia streaming] service to be successful from the data delivery and playback performance point of view, the *data delivery control* mechanisms in the service must also be well-defined.

(Spec. 1, ll. 31-33).

PRINCIPLES OF LAW

Admissions

"Admissions in the specification regarding the prior art are binding on the patentee for purposes of a later inquiry into obviousness." *Pharmastem Therapeutics, Inc. v. Viacell, Inc.*, 491 F.3d 1342, 1362 (Fed. Cir. 2007) (citations omitted). Such admissions can include statements of fact lacking "any indication of who discovered that fact." *In re Wiseman*, 596 F.2d 1019, 1023 (CCPA 1979). Arguments are insufficient to show discovery by Appellants. *Id.* "[T]here must be some evidence of record by way of

affidavits or declarations, or at least a clear and persuasive assertion in the specification, that the fact relied on to support patentability was the discovery of the applicants for patent." *Id.*

Obviousness

The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, and (3) the level of skill in the art. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). One cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. *In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

"The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 416 (2007). However, a "factfinder should be aware . . . of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning." *KSR Int'l Co. v. Teleflex, Inc.* 550 U.S. at 421 (citation omitted).

ANALYSIS

Issue 1

Based on Appellants' arguments in the Appeal Brief, we will decide the appeal with respect to issue 1 on the basis of claim 1 alone. *See* 37 C.F.R. § 41.37(c)(1)(vii).

Appellants argue that there "is no motivation to implement the system discussed in *Riddle* for a data delivery process without applicant's disclosure specifically pointing out this deficiency in the prior art . . . and suggesting a

solution." (App. Br. 8). This is not persuasive. The motivation relied upon is that "in order for a [multimedia streaming] service to be successful from the data delivery and playback performance point of view, the *data delivery control* mechanisms in the service must also be well-defined." (FF 5). This teaching was found under the "Background of the Invention" heading (FF 5). Thus, the teaching is presumed to be an admission of prior art knowledge.

Appellants now argue that they merely pointed "out the deficiency in the teachings of the prior art." (Reply Br. 3). But arguments are not enough. The evidence of record (affidavits, declarations, or at least a clear and persuasive assertion in the specification) must show that Appellants discovered the deficiency. *In re Wiseman*, 596 F.2d at 1023. Otherwise, admissions in the Specification are binding on Appellants. *See Pharmastem Therapeutics, Inc.* 491 F.3d at 1362.

Appellants argue that the Specification "points out what is needed in the art . . . that the data delivery control "mechanisms must be well-defined." (Reply Br. 2-3). According to this argument, an artisan of ordinary skill, seeking data delivery and playback success, would have no alternatives to defining the data delivery control mechanisms. Appellants present no evidence or arguments that an artisan of ordinary skill would seek from a data delivery and playback performance point of view without defining the data delivery control mechanisms. Thus, an artisan of ordinary skill possessing the teachings of Riddle and AAPA would be motivated to seek out teachings for how to define data delivery control mechanisms in order to provide data delivery and playback success (FF 5).

Riddle teaches how to define data delivery control mechanisms (FF 1, 3) within a multimedia context (FF 2). An artisan of ordinary skill, motivated to provide data delivery and playback success (FF 5), would have found it obvious to combine these teachings with the teachings in AAPA of a multimedia streaming service (FF 4). Such a combination would produce a multimedia streaming service (as taught by AAPA) with defined data delivery control mechanisms (as taught by Riddle).

For at least these reasons, we find that Appellants have not sustained the requisite burden on appeal in providing arguments or evidence persuasive of error in the Examiner's 35 U.S.C. § 103(a) rejections of claims 1-13 with respect to this issue.

Issue 2

Based on Appellants' arguments in the Appeal Brief, we will decide the appeal with respect to issue 2 on the basis of claim 1 alone. *See* 37 C.F.R. § 41.37(c)(1)(vii).

Appellants cannot show nonobviousness by attacking AAPA individually where the rejections are based on the combination of AAPA and Riddle. *In re Merck*, 800 F.2d at 1097. AAPA includes multimedia streaming services which require well-defined data delivery control mechanisms (FF 4, 5). Riddle teaches signaling and negotiation of mechanisms used for data exchange (FF 1-3). Appellants have not shown that the combination of AAPA and Riddle would yield anything more than predictable results (signaling and negotiation of mechanisms used to adapt a data delivery process). *See KSR*, 550 U.S. at 416.

For at least these reason, we find that Appellants have not sustained the requisite burden on appeal in providing arguments or evidence

persuasive of error in the Examiner's 35 U.S.C. § 103(a) rejections of claims 1-13 with respect to this issue.

CONCLUSIONS OF LAW

Based on the findings of facts and analysis above, we conclude that Appellants have not demonstrated:

1. that the Examiner erred in finding that it would have been obvious to one of ordinary skill in the art to combine Riddle and the AAPA (Issue 1) and

2. that the Examiner erred in finding that the combination of the Riddle reference and AAPA teaches the claimed signaling and negotiation of mechanisms used to adapt the data delivery process (Issue 2).

DECISION

We affirm the Examiner's decisions rejecting claims 1-13 under 35 U.S.C. § 103(a).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

Judges' Initials:

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